United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7429

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNE K. UNGER,

Plaintiff-Appellant,

—against—

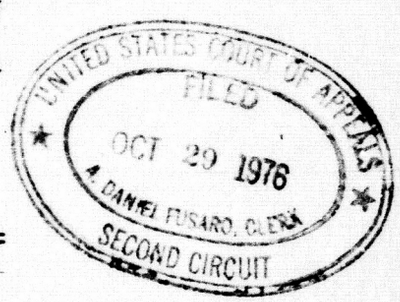
JOHN L. HETTRICK, DAVID J. LAUB, MARINE MIDLAND BANKS, INC. and PRICE WATERHOUSE & CO.,

Defendants-Appellees,

—and—

EDWARD W. DUFFY, CHARLES G. BLAINE, WM. WARD FOSHAY, ULRIC HAYNES, JR., ROBERT W. HUBNER, NORTHRUP R. KNOX, FELIX E. LARKIN, JOHN S. LAWSON, JAMES P. LEWIS, SOL M. LINOWITZ, WILLIAM A. LYONS, JAMES W. MCKEE, JR., ALLEN H. NEUHARTH, DAVID H. NORTHRUP, NATHAN R. OWEN, CORNELIUS W. OWENS, CLIFTON W. PHALEN, GERALD C. SALTARELLI, PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL, JOHN WILKIE, CHARLES A. WINDING and GERALD B. ZORNOW,

Defendants.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Authorities

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PLAINTIFF-APPELLANT'S BRIEF

(All Pages Cited Refer to Pages in the Appendix unless Otherwise Designated.)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Metzner, J.), entered in this action on August 6, 1976, dismissing this action as a class action, on the grounds that plaintiff had failed to move to have the action determined to be a class action within 60 days of commencing suit as provided by Rule 11A of the Civil Rules of that Court. At the same time, the Court denied plaintiff's application for deferral of the time to move for a class action determination so as to permit plaintiff to take discovery of defendants.

Issues Presented for Review

1. Did the District Court abuse its discretion in dismissing the action as a class action on the basis of plaintiff's omission to move for class action determination within 60 days of commencement of the action, in the absence of any showing of prejudice?

2. Should the District Court have extended the time to move for class action determination until such time as the parameters of the class could have been determined through discovery and other pretrial proceedings?

Statement of Facts

This is an action brought representatively by plaintiff, as a purchaser and holder of the common stock of defendant

Marine Midland Banks, Inc. ("Marine Midland"), against Marine Midland, its principal officers, and its directors, and against Price Waterhouse & Co. ("Price Waterhouse"), a firm of certified public accountants that had served as Marine Midland's outside auditors.

The Complaint, filed on January 29, 1976, charges all of the defendants with participation, since "in or about 1973," in a common course of conduct, plan and scheme to conceal and misrepresent the true financial condition, operating results, earnings and prospects of defendant Marine Midland, a bank holding company, and of thus committing violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), Rule 10b-5 promulgated thereunder and the common law. (5a-8a, 15a)

More specifically, the Complaint charges the defendants with acting in concert knowingly or recklessly to conceal from the public, including plaintiff and other similarly-situated purchasers of Marine Midland securities, such matters as:

> That Marine Midland was experiencing deterioration in asset quality, was undercapitalized and becoming increasingly undercapitalized and was threatened with serious liquidity problems, to such an extent that the Federal Reserve Board

("F.R.B.") had classified Marine Midland as a seriously problem-ridden bank holding company, whose affairs required close scrutiny (8a-9a);

That Marine Midland's major constituent banks had capitalization inadequate in relation to their risk assets, and their marginal and inferior quality assets and deposits, which inadequacies, combined with other problems, were sufficient to cause the F.R.B. examiners to assign them "ratings" indicating substantial deficiencies in their overall condition (10a);

That Marine Midland had suffered significant reverses relating to its loans and commitments to real estate investment trusts -- such loans having amounted to some $212,000,000 as of the end of the 1973 and 1974 calendar years -- and that these loans had given rise to potential losses in the area of $30,000,000; and that through various operating and accounting practices Marine Midland had wrongfully avoided recognition of loss of principal or income as to many of such loans (11a);

That, in the light of its problems in the real estate investment trust loan area, and other

specified areas of high risk and speculative lending, the utilization of obsolete methods of estimation had resulted in inadequate balance sheet reserves and income statement charges for loan loss reserve and provision, resulting in inaccurate reports with respect to asset values, earnings and the like (11a).

The Complaint further charges that during the same period, when Marine Midland and the other defendants were aware of, and were concealing, the facts that had given rise to the F.R.B.'s expressed concern and unfavorable ratings, defendants issued false and misleading statements and reports to the public, including the 1973 and 1974 Marine Midland Annual Reports; which reports contained affirmative misrepresentations related to the concealments just mentioned, and made baselessly optimistic projections. For example, the Complaint charges that the Marine Midland 1973 Annual Report baselessly predicted "better earnings performance in 1974." Further, affirmative misrepresentations are charged with respect to the reporting of loan loss reserve provisions and income statement charges, including claims of adequacy for the five-year moving average method and including income statement charges, in 1973, that did not even equal actual loan loss write-offs, and that wholly failed to allow for wholly

foreseeable losses arising out of the problems already mentioned and the deteriorating condition of the overall economy, which would lead to much more substantial losses in 1974 and in future years. (15a-19a)

In short, the gravamen of the Complaint is that Marine Midland, Price Waterhouse and the other defendants were through concealment and affirmative misrepresentation presenting to the investing public a picture of Marine Midland's condition and operations almost diametrically opposed to the picture known to them and to the cognizant federal authorities; thus effecting a fraudulent inflation of the price of Marine Midland securities that were purchased by plaintiff and others similarly situated. (20a-21a)

Defendants Marine Midland, John L. Hettrick ("Hettrick") and David J. Laub ("Laub") filed their Answer to this Complaint on February 26, 1976. (29a-31a) Of the 17 defendants served in the action, only these defendants had joined issue as of the time of the decision and order giving rise to this appeal. (3a-4a) Plaintiff had agreed to a series of stipulations, all approved by the Court, repeatedly adjourning the time of defendant Price Waterhouse to respond to the Complaint. (Ibid.) In addition, with respect to the "outside" directors of Marine Midland, plaintiff agreed to an open-ended extension of time, at the request of their counsel;

however, no formal stipulation was ever entered into or submitted to the Court on behalf of these defendants. (47a)

Simultaneously with their Answer, defendants Marine Midland, Hettrick and Laub served and filed an eighty-page set of interrogatories to plaintiff, containing some 300 separately numbered and lettered paragraphs, sub-paragraphs and sub-sub-paragraphs, most of which, in turn, contained several separate and distinct questions ("Marine Midland Interrogatories"). These interrogatories demanded painstakingly detailed exposition of each and every one of plaintiff's legal and factual contentions, and demanded identification and specification of all facts, documents and evidentiary material bearing upon the merits of plaintiff's case, as well as upon what could be described as class action issues. Plaintiff responded to these, after Court-approved extensions of time, on May 26, 1976 ("Response to Marine Midland Interrogatories"). At the same time, plaintiff responded to interrogatories that had been propounded by defendant Price Waterhouse. (56a) These, like a small number of the Marine Midland Interrogatories, dealt principally with plaintiff's standing and status as a class representative.

On April 28, 1976 -- precisely 89 days after commencement of the action -- defendants Marine Midland, Hettrick and Laub, and defendant Price Waterhouse, moved simultaneously to

dismiss this action as a class action, asserting that plaintiff had failed to comply with the provision of local Civil Rule 11A of the Southern District of New York calling for a motion for class action determination to be made within 60 days after commencement of a putative class action. The moving affidavits each consisted of recitals of the state of the proceedings to date, with little more. (32a-41a)

In opposition to the motion, while admitting and explaining the omission to seek class determination up to that time, the affidavit on plaintiff's behalf presented reasons for denying the extreme sanction sought by defendants and for granting deferral of the time to move. (44a-53a) This affidavit emphasized the lack of any prejudice arising from this omission, pointing out that only three defendants had as yet joined issue; that the Court had approved various extensions of time to join issue or move against the Complaint, or to respond to interrogatories; that defendants had propounded massive interrogatories to plaintiff with the expectation of slowing the litigation, and that plaintiff could not reasonably expect to be allowed to go forward until she had responded. Moreover, it stated that, had plaintiff moved for class action determination on the existing record, it would have been a necessarily futile and wasteful action. It pointed out that -- as the Complaint showed on its face -- plaintiff did not and could not know

either the precise starting point or the precise closing point of the potential class period, and therefore could not appropriately identify the membership of the class; and therefore could not reasonably ask for a class action determination until discovery and other pretrial proceedings had made such information available. Accordingly, the opposing affidavit asked that the Court exercise its discretion to refuse to dismiss the action, and also to defer the time for making a class action determination motion to an appropriate point in the litigation, i.e., a point when the record would permit a proper resolution of the questions involved.

The return date of defendants' motion was May 11, 1976. (32a) On May 24, 1976, an affidavit was filed in support of the motion on behalf of certain of the individual defendants, although these defendants were, at the time, in default. This affidavit attempted to raise the issue whether plaintiff could adequately represent the class, arguing that she could not inasmuch as certain of the director defendants had been elected after she purchased her Marine Midland securities. (54a)

While the motion to dismiss was pending, plaintiff served and filed extensive responses to the outstanding sets of interrogatories propounded by defendants. (4a; 56a) In addition, on June 11, 1976, plaintiff served and filed a detailed First Request for Production of Documents. (4a) This Request was

responded to in writing by defendants Marine Midland, Hettrick and Laub (4a); the response largely taking the form of objections to production. ("Response to Request for Production," filed July 14, 1976.) In the interim, at the request of defendant Price Waterhouse, its time to respond was adjourned on two separate occasions, with the approval of the Court. That defendant's time to move or answer was also extended, this time until mid-September. (4a)

On August 6, 1976, the District Court, in a brief order and memorandum, granted defendants' motion to dismiss this action as a class action, and accordingly denied plaintiff's request for relief in its entirety. (58a-61a)

The Opinion Below

In its memorandum decision, the Court below held, with respect to the motion to dismiss, simply that:

> "Sufficient reason has not been given for plaintiff's failure to comply with the rules.
>
> "The action is dismissed as a class action, but of course may be maintained as an individual action." (60a-61a)

With respect to plaintiff's arguments as to why, despite her omission to file a motion for class action determination, dismissal was an inappropriate remedy, the Court said only that, "Plaintiff responds that her failure to move

for class action determination was inadvertent...." (59a)

In rejecting plaintiff's argument that discovery should precede class action determination, the Court held:

> "Discovery by plaintiff is not necessary to determine class action status. Plaintiff knows her relationship to the alleged wrongdoing. Class action orders are always subject to change as discovery proceeds." (60a)

Thus, the Court rejected plaintiff's argument that at least some discovery should precede class action determination, in order to determine the parameters and membership of the class, with particular reference to the alleged times when the course of wrongful concealment and misrepresentation commenced and ceased.

The decision appears to rely heavily upon what the Court took to be the mandatory character of Rule 11A, but does not advert to the provisions of Rule 11A(d), which states that, when plaintiff has not moved for class action determination within 60 days, and defendants move to dismiss on that basis,

> "...in ruling upon such a motion...the Court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances."

ARGUMENT

POINT I

DISMISSAL OF THIS LITIGATION AS A CLASS ACTION DUE TO PLAINTIFF'S OMISSION TO SEEK CLASS ACTION DETERMINATION WITHIN 60 DAYS OF ITS COMMENCEMENT WAS, PARTICULARLY IN THE ABSENCE OF ANY SHOWING OF PREJUDICE, AN ABUSE OF DISCRETION ON THE PART OF THE DISTRICT COURT, AND SHOULD BE REVERSED.

The District Court has imposed upon plaintiff, and the putative members of the class, a wholly draconian and inappropriate penalty for omission to comply with the provision of local Civil Rule 11A that calls for the making of a class action determination motion within 60 days of commencement of such a litigation -- an omission that has been described in similar circumstances as a "de minimis lapse." Gilinsky v. Columbia University in the City of New York, 62 F.R.D. 178, 180 (S.D.N.Y. 1974; per Lasker, J.).

The imposition of this sanction, under the circumstances present here, is contrary to the weight of reasoned authority, particularly where there has been no prejudice either to defendants or to the processes of justice. See, e.g., Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974); Sanders v. Lum's, Inc., 1975-76 CCH Fed. Sec. L. Rep. ¶ 95,536 (S.D.N.Y., April 12, 1976); Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970); Dickerson v. United States Steel Corporation, 18 F.R.Serv.2d 554 (E.D. Pa. 1974).

As will be more fully developed below, there has been no prejudice here to defendants because, inter alia, there has been no discernible delay in the progress of the litigation, nor have they been in any way misled as to whether or not this action was intended to be prosecuted as a class action. There has been no prejudice to the processes of justice for those same reasons and because the making of a class action motion in this case prior to any discovery by plaintiff, and prior even to the joinder of issue by most defendants, would have been a futile and frivolous action on plaintiff's part, and would have retarded rather than advanced the processing of this litigation.

The rigid application of Rule 11A as has been imposed in the case at bar does not work to uphold the fundamental policy of FRCP Rule 23, which, we submit, requires an appropriately prompt -- not a precipitous -- class determination. See, e.g., Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 242 (2d Cir. 1974). More importantly, the policy of the rule favors, and was intended to facilitate -- not to make more difficult -- the maintenance of properly-framed class actions. See, generally, Frankel, J., Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1967). See also, La Reau v. Manson, 383 F. Supp. 214 (D. Conn. 1974). Further, it is a truism, but still a truth,

that one fundamental policy inherent in the framework of the Federal Rules of Civil Procedure is a policy that disfavors procedures that cause serious and potentially meritorious litigation to be terminated on technical grounds rather than on the merits. See, South Suburban Safeway Lines, Inc. v. Carcards, Inc., 256 F.2d 934 (2d Cir. 1958); Nagler v. Admiral Corporation, 248 F.2d 319 (2d Cir. 1957).

These underlying policy considerations are particularly applicable to the kinds of cases that FRCP 23 was especially intended to facilitate; Rodriguez v. East Texas Motor Freight, supra. One such kind of case is the private action for enforcement of rights arising under the federal securities laws, and it has been repeatedly recognized that the stockholder class action is a essential tool for the vindication of such rights. E.g., Mills v. Electric Auto-Lite Corporation, 396 U.S. 375 (1970); Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 356 (2d Cir. 1973); Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968); Escott v. Barchris Construction Corp., 340 F.2d 731 (2d Cir. 1965).

These underlying policies should inform and govern the application of Rule 11A, promulgated not as a penal provision, but as an aid to effectuation of the larger policy considerations inherent in Rule 23. See Frankel, op. cit., supra, at 40-42. Rule 11A(d) requires the Court to exercise "informed

discretion." Far from mandating the manner in which its requirements should be enforced, much less mandating the sanction imposed here, Rule 11A(d) specifically authorizes the Court, when a motion to dismiss is made, to impose no sanction whatever, to deny the motion or to grant whatever relief seems appropriate under all the circumstances of the cause before it.

As we will show, there was no reason whatever for imposition of the terminal sanction of dismissal, which effectively ends this litigation.* As compared with other cases where plaintiff and the plaintiff class suffered no penalty for delay in seeking, or omission to seek, class determination, there has been no appreciable or even measurable delay -- and, as in other such cases, the uncontradicted facts of record make clear that the omission was inadvertent and not motoviated by any intent or purpose which could be subject to criticism.

Where no prejudice has been found to have resulted, the great weight of reasoned authority is that class action status should not be denied, nor should a class action be dismissed, solely due to delay in the making of a motion for class action determination. In Gilinsky v. Columbia University in the City of New York, supra, the case had been pending for

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* The record shows that the named plaintiff's total investment in Marine Midland common stock was $1,841.14, and it is beyond all reasonable doubt clear that continued prosecution of her individual claim is a practical impossibility.

approximately four months; and defendants contended that for this reason, pursuant to Rule 11A, the action should be dismissed as a class action. Rejecting this argument, Judge Lasker noted that defendants had shown no prejudice, and that the case was of "recent origin." Granting class action certification, he described plaintiff's failure to comply with Rule 11A as a "de minimis lapse which does not alone justify denying class status to the action." (62 F.R.D. at 180.) The Court specifically adverted to, and declined to follow, an earlier ruling, in Walker v. Columbia University, 62 F.R.D. 63 (S.D.N.Y. 1973). The decision in the Walker case -- a rare instance of dismissal of a class action solely for failure to seek class action determination within sixty days -- contains no discussion of the underlying facts and circumstances. Like the decision of the District Court in the instant case, it appears to be a virtually automatic application of the dismissal sanction, without consideration of alternatives. We submit that it should not be followed.

The proper exercise of discretion in the application of Rule 11A(c) and (d) is, we submit, illustrated again in the recent case of Sanders v. Lum's, Inc., 1975-76 CCH Fed. Sec. L. Rep. ¶ 95,536 (S.D.N.Y., April 12, 1976), which, like the instant case, was an action arising under the federal securities laws. There, Judge Motley granted class certification,

despite plaintiff's delay of more than five years in seeking such relief.

The Court there emphasized the necessity of taking a "non-mechanical" approach to application of FRCP Rule 23(c)(1) and Rule 11A(c):

> "While the language of such provisions may seem on its face to support defendants' claim of untimeliness, the application of these provisions by the courts has produced a great deal of flexibility in adapting to the particular fact patterns of individual cases.
>
> "Such exercise of judicial discretion has been frequently applied where the claim of untimeliness is raised in regard to a class certification motion. [Citations omitted.] Indeed, it is specifically sanctioned under local Civil Rule 11A(d)." (At p. 99,717.)

Accordingly, weighing such factors as the lack of prejudice to the defendants arising from the delay against the potential prejudice to plaintiff and the members of the plaintiff that would arise from denial of class certification, the Court in Sanders imposed no sanction for failure to seek class certification within the time provided.

The import and purpose of Rule 11A was accurately reflected in the case of Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971), cited by the Court in Sanders as a leading illustration of the interpretation of those rules which the "courts have adopted." (1975-76 CCH Fed. Sec. L. Rep. at p. 99,717.) There, plaintiff had commenced a putative class

action and had omitted for more than two years to move for class action certification. An individual settlement had been negotiated, and plaintiff's counsel, with no opposition, sought to abandon the class action portion of the suit. The Court refused to permit this, and required the making of a class action motion and publication of notice to potential members and representatives of the class. In so doing, Judge Frankel made it clear that both FRCP Rule 23 and Rule 11A had, as important purposes, the protection of plaintiffs' and potential class members' rights, as well as promotion of the expeditious handling of litigation.

This decision, contemporaneous with the adoption of Rule 11A, is a strong indication of its intent and proper application -- as an administrative rule to protect all legitimate interests before the Court, and not as a penal statute or trap that may operate as a deadfall for otherwise meritorious litigation.

Another contemporaneous decision, Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970), further supports this proposition. Although the action had been pending for approximately three years, the Court refused to deny class action treatment to a shareholder action, on the grounds of delay alone, and in the absence of any showing of prejudice to defendants. Judge Tenney said:

> "With regard to plaintiff's alleged delay in seeking class determination, defendants cite no authority and this Court is aware of none which requires withholding class determination solely because of a delay in bringing on the motion. While Rule 23(c)(1) seeks to discourage unnecessary delays in moving for class determination, absent a showing of prejudice to either the class or the defendant, denying the motion would seem to be a harsh result which could prejudice the class." (At 181-182.)

There, as here, no delay had been occasioned by the failure to make an early class determination motion, inasmuch as discovery had gone forward in the interim. Thus, the Court determined, quite properly we submit, that plaintiff and her counsel had not been guilty of dilatory conduct, and "absent a showing of prejudice," the delay was "not significant enough" to result in the denial of class action treatment. (Ibid.)

Other authorities continue to uphold both the result and the rationale of the above-discussed decisions. In Zolotnitzsky, et al. v. Yablok, et al., 1973-74 CCH Fed. Sec. L. Rep. ¶ 94,513 (S.D.N.Y. 1974), an action commenced in 1967 was certified as a class action in 1974. There, when plaintiffs moved for an order designating the suit as a class action, defendants not only opposed the motion but cross-moved to dismiss the complaint for lack of prosecution. Determining that the case should be maintained as a class action, despite a delay which was described as "inordinate" in making the class action motion, the Court said:

"Further, the mere fact of delay should not serve to defeat a class action determination. Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970). Moreover, the defendants have continuously been on notice that this action was being pressed as a class suit and they have not alleged, and presumably they cannot, that they have been prejudiced in any way."

In another, more recent case, a court in the Southern District has found the argument that delay in moving for class action determination, in the absence of a showing of actual prejudice, should nonetheless bar a class action to be unworthy even of discussion. In Meyer v. Stevenson, Bishop, McCredie, Inc., 74 Civ. 5274 (JMC) (S.D.N.Y., May 11, 1976), a case commenced in early December 1974, defendants moved, on June 6, 1975, to dismiss the action as a class action, asserting, inter alia, that plaintiff's failure to seek class certification required a determination that he would not adequately represent the class. Relying on Walker v. Columbia University, supra, and Rule 11A, defendants argued that plaintiff's failure to seek class certification for more than six months after commencing his action demonstrated that his attorneys could not "fairly and adequately" serve the interests of the class. (Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, p. 12.) Plaintiff moved for class certification on July 23, 1975. The motion for class certification was granted in the above-noted mmemorandum decision, Judge Canella rejecting, without mention, defendants'

arguments for dismissal.

These authorities, we submit, establish that it is the reasoned view of the District Courts that mere delay in seeking certification -- even where fairly protracted -- does not justify the termination of proposed class action litigation, in the absence of any showing of actual prejudice to defendants, or to the administration of justice. Significantly, the sole authority cited by the District Court here was Wolfson v. Solomon, 54 F.R.D. 584 (S.D.N.Y. 1972), where class action determination was granted. The Court discussed the "early" adjudication of class action issues in the context of rejecting defendants' contention that "Rule 23 requires findings of fact to be made before a class may be determined; and that, in turn, mandates an evidentiary hearing in all cases." (54 F.R.D. at 589.)

In Wolfson, the Court said that FRCP Rule 23 should not be interpreted to permit defendants to delay indefinitely and protract class action litigation by insisting upon a mini-trial of the merits prior to class action determination. There was no question of a punitive application of either Rule 23 or Rule 11A. Quite the contrary, Judge Gurfein indicated that he would be inclined to permit delay to give plaintiffs an opportunity, if necessary, to present evidence if the alternative were to deny class action status. He wrote:

"A denial should, of course, not be made without giving the plaintiffs an evidentiary opportunity, if requested, except in a rare case; this is true because such a denial is often an effective end of the suit." (Id. at 590, n. 6.)

The reported cases in other jurisdictions have, with substantial uniformity, taken the same approach, and have refused to terminate class litigation under circumstances analogous to those present here. See, Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970); Souza v. Scalone, 64 F.R.D. 654 (N.D. Cal. 1974); Dickerson v. United States Steel Corporation, 18 F.R.Serv.2d 554 (E.D. Pa. 1974). In the last-cited case, plaintiffs had omitted to comply with a local rule requiring that a class action determination motion be made within 90 days of commencement of the action. Despite this omission, the Court not only imposed no sanctions but ordered that plaintiffs should have an opportunity to take reasonable discovery proceedings so as to make possible an informed class action determination. The Court said:

"Plaintiffs would be substantially prejudiced if they had to make a showing that their action should be maintained as a class action without possessing sufficient information about the size and character of their potential class." (At 555.)

Wherever the question whether omission or delay in moving for class action determination should result in dismissal, or any sanction, has been given the balanced consideration

which the applicable rules require, the crucial factor in decision has been prejudice, or its absence. In this case, the entire absence of any showing of prejudice to the defendants, or to the administration of justice, is, we submit, reason enough for reversal. As already noted, the opinion of the District Court is utterly silent on the question of prejudice of any kind or any degree, either to the defendants or to the court's processes. The question remains whether there can have been any consideration of this factor, not articulated, that would form a basis for this Court's finding that the remedy of dismissal was appropriate. We submit that there could not have been.

The Absence of Any Showing of Prejudice

The record here is entirely barren of any facts that could give rise to a finding that the absence of a class action motion had caused prejudice in any form, or in any degree. If there were any such facts, we submit that the moving defendants would have set them forth in their affidavits; and these affidavits are wholly devoid of either factual matter pointing to prejudice, or even any claim thereof. (34a-36a; 40a-41a)

Instead of any attempt to make such a showing, defendants Marine Midland, Hettrick and Laub argue, in their Memorandum seeking dismissal, that prejudice to defendants is inherent in the pendency of an action against them -- particularly in the light of what they assert to be their

own high position and standing. They argue:

> "No one should be compelled to labor indefinitely under the shadow of allegations of wrongdoing and concomitant claims for awesome damages. When the object of such charges is a respected bank holding company which trades in public confidence and which must report regularly on its affairs to the investing public, the Securities and Exchange Commission and state and federal banking authorities, swift vindication becomes all the more important." (Memorandum of Certain Defendants in Support of Motion to Dismiss Plaintiff's Class Allegations, p. 9.)

The argument continues to the effect that the class action is, as such, a form of action that should be discouraged wherever possible; that the maintenance of a class action is a privilege, rather than a right, and that a proposed class action plaintiff should be treated more harshly, merely for bringing an action in that forum, than a litigant bringing an individual action. (Ibid.) We submit that this is contrary to the policy and the law as developed in this Circuit and elsewhere. As this Court said, in Chris-Craft Industries Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973):

> "The SEC of course has been entrusted -- by the statutes and implementing decisions -- with the primary responsibility of protecting the public interest under the federal securities laws. But the Supreme Court, as well as other federal courts including our own, have recognized that vigorous enforcement of the federal securities laws, particularly the antifraud provisions, can be accomplished effectively only when implemented by private damage actions.

* * *

"This policy of vigorous enforcement through private litigation has been the instrument for forging many salutary developments in the securities fraud area...." (At 356.)

Particularly where, as in the instant case, the corporate defendant, as its counsel states, "trades in public confidence" in order to obtain the funds of the public for its corporate purposes, it is not entitled to "swift vindication" where serious charges have been laid against it directly concerning its entitlement to the trust and confidence of the investing public, unless such vindication is on the merits. If Marine Midland and the other defendants knowingly or recklessly concealed from or misrepresented to the public facts concerning its financial condition, earnings and operations of the nature and significance alleged in the Complaint (8a-19a), these concealments were a serious abuse of the public trust, and of the position of the defendants. Moreover, from such information as has become available to the public, there are at least reasonable grounds to believe that the conditions found to exist by Federal Reserve examiners were significantly at variance with the picture presented to the investing public. (See Response to Interrogatories of Defendants Marine Midland Banks, Inc., et al., "First Set," ¶¶ 5(a)-5(r), 8(a).) It is indeed

true that these charges are serious; which, we submit, is all the more reason why they should be accorded a fair and complete hearing, for the protection of both the financial community and the investing public. Denial of such an opportunity on technical grounds will, we submit, do nothing to restore the confidence of investors in the securities of banks and similar financial institutions.

Apart from the invalidity of defendants' argument that prejudice inheres in the pendency of the action, it is equally clear that there has been no prejudicial delay, and surely none that can be laid to plaintiff. No matter how well it may be conducted, litigation of this seriousness, complexity and magnitude does not lend itself to rapid disposition. As is typical in suits of this nature, the first discovery efforts by defendants were of a kind that inevitably, and not accidentally, serve the purpose of retarding plaintiff's development of her case by demanding information, in excruciating detail, as to facts in the exclusive knowledge of defendants, and by otherwise imposing a heavy burden upon counsel, which must be dealt with before further progress can be made. Upon joining issue, defendants Marine Midland, Hettrick and Laub served on plaintiff the massive set of interrogatories mentioned above. (Statement of Facts, supra, at p. 7.) This document, whose numbered paragaphs, sub-paragraphs and sub-sub-paragraphs

propounded hundreds of separate questions, was plainly not designed primarily to elicit factual information or other discovery material. Illustrative of their predominant purpose are its demands for a detailed exposition of plaintiff's contentions, in a manner that would be more appropriate to a pretrial memoandum, as well as the somewhat unusual demands for definition of virtually every operative term in the substantive paragraphs of the Complaint. (See, Marine Midland Interrogatories, ¶¶ 5(a)-5(bb), 8(a)-8(n), 11(a)-11(z).) As we submit was recognized on all sides, as evidenced by the Court's approval of extensions of time to respond to these Interrogatories, they did not lend themselves to speedy response; but required careful and painstaking attention from the point of view of furnishing such answers as could be proffered, and in framing contentions and objections so as to protect the rights of plaintiff and those she proposed to represent.

Similarly, we submit that defendant Price Waterhouse cannot have been prejudiced by any delay, having received repeated extensions of time answer or to move with respect to the Complaint, and having not to this day joined issue. (4a) As to the individual defendants, other than Messrs. Hettrick and Laub, none of those who have been served either joined issue, moved against the Complaint or obtained any formal extension of time to act. (4a) Again, we submit that these

defendants have presented nothing to show delay or prejudice attributable to plaintiff, because there is no basis for any such assertion.

It is also significant, we submit, that there has not been any such delay in the progress of this litigation as as to prejudice the administration of justice. Plaintiff has responded to extensive interrogatories propounded to her, including those purporting to explore issues going to class action determination. Moreover, having answered these interrogatories, plaintiff attempted to further the progress of the litigation by requesting production of documents from defendants. To date, the only response to this request has come from defendants Marine Midland, Hettrick and Laub; and this response consisted mainly of objections to the production requested. Defendant Price Waterhouse requested, and received, extensions of time to respond; and the remaining individual defendants neither responded nor sought extensions of time in which to do so. (4a)

Futility of Class Determination Attempt at this Stage of the Litigation

There is, however, still another and even stronger reason why there has been no prejudice in any sense arising out of the omission on plaintiff's part to file a class action motion within the first months after commencement

of this action -- and that is because such a motion would have been a total exercise in futility. Far from resulting in an early class action determination, and the more expeditious processing of the action, such a motion could have resulted only in delay. Almost certainly, there would have followed dilatory litigation, on an inadequate record, with respect to plaintiff's standing as a class representative, with respect to the membership and parameters of the class, with respect to the proper class period, with respect to the time when the wrongful course of conduct alleged commenced and the time when it may have ended, and with respect to the various subsidiary issues necessary for decision in determining the timing and scope of notice to be transmitted to class members. These problems arise from the nature of the claims asserted. This is not a case where plaintiff and the putative class rely on a single event, transaction or occurrence -- or a single misrepresentation or omission. Rather, the harm asserted is alleged to have arisen from a course of conduct commencing in 1972 and continuing until at least the time of the filing of the action, involving closely-related omissions and misrepresentations. Under the doctrine of Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968), it is entirely appropriate for a single plaintiff to represent persons who purchased securities of Marine Midland throughout the period when the related material matters asserted to have

been concealed and misrepresented affected the market price of those securities. However, the problem of defining the parameters and membership of the class is more complex here, since, as is clear on the record, and uncontradicted, plaintiff presently has had no access to the information needed to define the class. Under such circumstances, we submit that there is no reasonable possibility that a class action motion by plaintiff would have resulted in prompt class determination. On the contrary, such premature class action determination motions have frequently been denied, with the Court granting leave to renew the application at an appropriate later time. For example, in Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 353 F. Supp. 264 (S.D.N.Y. 1972), aff'd, 495 F.2d 228 (2d Cir. 1974), another case involving the concealment of material information, the Court found it impossible to determine class membership and parameters properly, even though the case had been pending for approximately two years, the pleadings had been closed, some discovery had taken place and the basic issues going to defendants' liability had been found ripe for determination. Significantly, neither this Court nor the District Court considered that defendants had been prejudiced by the procedures followed, which had the effect of leaving the class action question open, until a point quite close to the determination of the essential liability issues involved in the suit.

Similarly, in Burstein v. Slote, 12 F.R.Serv.2d 23.1 Case 2, at p. 577 (S.D.N.Y. 1968), the Court, finding that it could not determine whether named plaintiffs could properly represent persons who purchased the securities in issue at varying times, and from various brokers, and finding that it could not determine the membership of the class or the numerosity thereof, denied their class action motion "without prejudice to renewal, should discovery proceedings provide the information necessary to remedy the present deficiencies in plaintiffs' class allegations." (At 578.) Once again, in Robinson v. Penn Central Co., 16 F.R.Serv.2d 1486 (S.D.N.Y. 1973), upon its finding that, prior to at least threshold discovery, it was impossible to determine the issue of whether common questions of law or fact predominate, or whether plaintiff was a proper representative of the putative class, the Court determined that:

> "The proper course of action here is to deny plaintiff's motion without prejudice to renewal upon a proper showing that the problems enunciated in this opinion are resolved or resolvable." (At 1489.)

Nor, we submit, are these authorities unusual. On the contrary, the courts in this District have frequently expressed the opinion that, where there are serious uncertainties that bear upon the propriety of class action treatment and other class issues, a class action motion should be

denied, although with leave to renew at a later time, pending the availability of an adequate record. Thus, in Victorian Investors, et al. v. Responsive Environments Corporation, et al., 1972-73 CCH Fed. Sec. L. Rep. ¶ 93,626 (S.D.N.Y. 1972), the Court denied, with leave to renew, plaintiffs' class action motion made two and one-half years after commencement of the action. Defendants had contested the issues whether certain of the plaintiffs were appropriate class representatives, whether they were similarly situated as compared to those whom they purported to represent and whether the proposed class or classes would satisfy the criteria for determination of manageability. In the light of these issues, the Court held that the question whether class action treatment was appropriate, "should be resolved after discovery is complete and the pleadings are in final form for trial." See also, Becker v. Schenley Industries, 1972-73 CCH Fed. Sec. L. Rep. ¶ 93,669 (S.D.N.Y. 1972). Significantly, some two months after the above-cited decision in the Victorian Investors case, Judge Griesa, to whom the case had been assigned for trial, upon review of the record and subsequent to a pretrial conference, determined that the class action motion was by then ripe for determination, and proceeded to grant class action determination to the original plaintiffs. At the outset of his opinion, he noted that this motion had been filed in May 1972, while the action had been brought

in January 1970; and found no reason to consider that this delay should result in depriving plaintiffs of the right to prosecute their class action. See Victorian Investors v. Responsive Environments Corp., 16 F.R.Serv.2d 1297 (S.D.N.Y. 1972).

The difficulties arising from the making of class action motions, and from attempts to determine them, at a stage of the litigation so early that the record does not permit intelligent determination, appear not only from the above-discussed cases where class action motions have been denied without prejudice, but from others where determination of a class action motion has been deferred. In Sanders v. Levy, et al., 69 Civ. 1242, three actions, now consolidated, were commenced between March and June of 1969. They were consolidated in December 1969. A motion for class action determination was made on March 30, 1973. That motion was not decided until May 15, 1975 -- after substantial discovery on both sides, submission of supplemental papers, and vigorous litigation on all sides as to the definition of the class and related issues. That litigation is now before this Court for rehearing en banc of the decision of this Court (Slip Opinion, dated June 30, 1976, Docket Nos. 75-7608, 75-7610, 75-7611) affirming the District Court's determination that the consolidated cases might be maintained as a class action, but

reversing the District Court with respect to certain other matters relating to the administration of the litigation.*

Nor does Sanders v. Levy, et al., supra, represent an unusual instance. Few reported decisions discuss, or even note, the frequency of, or the reasons for, substantial lapses of time between the making of class action motions and their determination. But there are numerous unreported instances in the Southern District that indicate that, at least in securities fraud cases involving open market purchasers, and involving both misrepresentations and omissions, such motions have simply not been felt to be ripe for rapid determination upon less than full records. For example, in Smith v. Bell, 71 Civ. 3954 (WCC), the class action motion was made by plaintiffs on August 7, 1973, and was decided some thirteen months later, class action status being granted on September 6, 1974. In Sirota v. Solitron Devices Inc., et al., 75 Civ. 1369 (CLB, Jr.), plaintiff's motion for class action determination was made on February 25, 1976, after plaintiff had had some discovery of defendants. The motion first came on for a hearing before Judge Brieant on May 12, 1976. In the light of open questions with regard to the closing date for class membership, the number of

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* The prior proceedings and decisions are summarized in Brief of Plaintiffs-Appellees on Rehearing in Banc, pp. 7-15, Docket No. 75-7608.

class members and issues raised by the defendants as to the manageability of the class, the Court deferred determination of the motion pending further discovery. (Transcript, May 12, 1976, pp. 9-10, 15, 24-25.) As of the date hereof, the motion remains pending. Similarly, in Stewart v. Polaroid Corporation, et al., 75 Civ. 2138 (KTD), the class action determination motion was filed by plaintiff on July 31, 1975. That motion was repeatedly adjourned, to permit discovery and other proceedings to go forward. The final reply memorandum was submitted on March 25, 1976. Once again, the motion remains sub judice at this time.

In the consolidated actions now entitled Lewis, et al. v. Teleprompter Corporation, et al., 73 Civ. 3929 (LFM), some, but not all, plaintiffs in seven related cases moved for class action determination prior to the time when the actions were consolidated. When consolidation was ordered, on November 19, 1974, the class action motions that had been made were ordered withdrawn without prejudice and subject to renewal. Plaintiffs in the consolidated action moved again for class action determination on April 2, 1975; and class action status was eventually granted on September 25, 1975.

These cases, we submit, illustrate a practice of avoiding premature action upon class action determination; and illustrate a tacit understanding that the rights of the

parties are protected, rather than prejudiced, by deferral of class action determination until the Court is able to determine from the record not only whether class action treatment is appropriate, but also of the subsidiary issues required to be resolved by FRCP Rule 23, including the precise beginning and ending dates of the class, the membership thereof, the predominance of common questions of law and fact and the questions of class size, manageability and notice.

In summary, we have shown that there is substantial uniformity of authority that, in the absence of prejudicial delay or other prejudice, mere delay in seeking class action certification is not a proper basis for dismissal of a class action complaint. See also, Bernstein v. National Liberty International Corporation, 407 F. Supp. 709 (E.D.Pa. 1976). In addition, we have shown conclusively, we submit, that there has been no prejudice here; that the course of the litigation has not been delayed by the lack of a class action determination motion, and that on the present state of the record here a class action motion would have been premature and its making could only have resulted in its denial, or in deferral of its determination until a fuller record had been developed.

In the light of the foregoing, and also in the light of the fact that the District Court did not make or

express findings in support of its determination that the ultimate sanction of dismissal should be imposed, we submit that the decision should be reversed. It is recognized that the relevant rules give the district courts discretion in this area. However, as Judge Frankel has pointed out, in discussing FRCP Rule 23, this grant of discretion had the purpose of calling upon the district courts "to piece out a huge body of procedural common law by giving all the hard labor and creative imagination we can muster for this purpose"; and was not intended to lead to inconsistent treatment of indistinguishable cases. Frankel, J., Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1967).

In this case, the determination of the District Court to dismiss the action as a class action is just such an inappropriate and inconsistent treatment. In such cases, appellate courts have reversed the denial of class action status, particularly where such denial was based on the lack of a timely class action motion, or was grounded upon an erroneous view of the applicable law and policy. See Yaffee v. Powers, 454 F.2d 1362, 1365-66 (1st Cir. 1972); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 49-51 (5th Cir. 1974); Castro v. Beecher, 459 F.2d 725, 731-32 (1st Cir. 1972); Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968). In the Rodriguez case, the Court of Appeals reversed the District

Court's dismissal of the class action portion of the action, even though no class certification motion had ever been made, and the dismissal of the class allegations took place after trial. Similarly, in the Castro case, the finding of untimeliness was reversed although no formal application for class action treatment had been made until the early stages of the trial on the merits. In the Yaffee, supra, the Court pointed out that where the District Court had taken an erroneous view of the principles to be applied, it was appropriate to hold that "Much of the available discretion was not exercised," and that it was therefore not necessary to defer to that discretion. (454 F.2d 366.) Similarly, in Ellis v. Flying Tiger Corporation, 504 F.2d 1004 (7th Cir. 1972), the Court held that where the record did not show an appropriate consideration and weighing of relevant factors, "There can be no basis for adhering to the rule on discretion." (At 1006.)

We submit that the case at bar presents another appropriate instance for the application of the rationale of the above-cited authorities. The Supreme Court has, in an analogous context, held that it was an abuse of discretion, and a violation of "the spirit of the Federal Rules," to deny a post-judgment application for leave to file an amended complaint. Foman v. Davis, 371 U.S. 178 (1962). The Court relied strongly on the absence in the decisions below of any

appropriate reason for this denial,

> "...such as undue delay, bad faith or dilatory motive...repeated failure to cure deficiencies ...undue prejudice to the opposing party...etc." (At 182.)

The Court emphasized, in the context of that case, the overriding policy of the Federal Rules to,

> "...reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome...." (At 181-182.)

We submit that such considerations are equally significant here. The proper approach to the determination of the issues before this Court was expressed in Yaffee v. Powers, supra, where Judge Coffin wrote:

> "Our purpose is not to chart the future of this litigation, but to indicate that there are certain standards governing the recognition of a class....At this juncture, unless a claim is patently frivolous, that court should ask itself: assuming there are important rights at stake, what is the most sensible approach to the class determination issue which can enable the litigation to go forward with maximum effectiveness from the viewpoint of judicial administration?" (454 F.2d at 1369.)

We respectfully submit that no such approach was taken here; and that the District Court, rather than appropriately considering the applicable legal principles, and all of the facts and circumstances of record, acted upon the premise that omission to file a class action motion within 60 days of commencement of the action mandated dismissal. Thus, we submit that the decision of the District Court should be reversed.

POINT II

THE DISTRICT COURT SHOULD HAVE DEFERRED THE TIME FOR MAKING OF A CLASS ACTION DETERMINATION MOTION, AND SHOULD HAVE PERMITTED PLAINTIFF TO HAVE THE DISCOVERY NECESSARY TO AN INTELLIGENT DETERMINATION OF THE INCLUSIVE DATES OF CLASS MEMBERSHIP, AND THE PARAMETERS AND MEMBERSHIP OF THE CLASS.

The District Court denied plaintiff's request for deferral of the time to make a class action determination motion so that plaintiff might have the discovery necessary in order to define the parameters and membership of the class, particularly with respect to the proper opening and closing dates for class membership. The stated reason for denial of this request was that plaintiff did not need such discovery, inasmuch as she "knows her relationship to the alleged wrongdoing." (60a) Even in the light of the unquestioned power of the Court to revise class action orders during the course of the litigation (FRCP Rule 23(c)(1)), this holding simply fails to recognize the issues involved or to apply appropriate principles of decision to them. Especially since this Court has held it appropriate to deny a class action determination motion, with leave to renew, where the membership and parameters of a proposed class cannot be properly identified, Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 242 (2d Cir. 1974), it must be clear that

plaintiff's own position is at best a starting point for inquiry into these issues. The Shapiro decision, along with the other authorities we have already discussed wherein a similar result was reached, or wherein the Court by other means deferred determination of class action status and class membership (Point I, supra, at pp. 30-36), points unerringly to the conclusion "that plaintiff should be given an opportunity at least to complete threshold discovery," before an effort is made to determine whether a class action is to be maintained, and to define the class. Robinson v. Penn Central Co., 16 F.R.Serv.2d 1486, 1489 (S.D.N.Y. 1973). There is more than ample authority that such discovery as is necessary to define the class period adequately, and the parameters and membership of the class, should routinely be permitted, and is permitted. Burstein v. Slote, 12 F.R.Serv.2d 577 (S.D.N.Y. 1968); Branch v. Reynolds Metals Co., 17 F.R.Serv.2d 494 (E.D. Va. 1972); Dickerson v. United States Steel Corp., 18 F.R.Serv.2d 554 (E.D. Pa. 1974); Wolfson v. Solomon, 54 F.R.D. 584 (S.D.N.Y. 1972); Appleton Electric Co., v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 70 Civ. 3653 (S.D.N.Y., July 11, 1974); (unreported decision). In Burstein v. Slote, supra, plaintiffs were permitted to take depositions with respect to the nature and extent of the class, the Court saying:

"Since amended Rule 23 has been in effect, all examination with respect to such subject matter has been permitted in this District. See Herbst v. Able, 278 F.Supp. 664 (SDNY 1967); Crabtree v. Hayden Stone Inc., 67 Civ. 3986 (January 16, 1968, April 5, 1968); Kronenberg v. Hotel Governor Clinton Inc., 66 Civ. 1297 (October 28, 1966)." (At 579-580.)

The settled practice of permitting such discovery recognizes that decision of a class action determination motion "usually should be predicated on more information than the complaint itself affords." 7A Wright and Miller, Federal Practice and Procedure, § 1785, at p. 131. And indeed, it has been recognized that in some circumstances it may be "essential to complete discovery before moving to class determination." Feder v. Harrington, 52 F.R.D. 178 (S.D.N.Y. 1970).

We submit that the case at bar is clearly one where some discovery, if not complete discovery, is a necessary prerequisite to plaintiff's making of an intelligent class action determination motion. The Complaint alleges a period in which numerous related concealments and misrepresentations took place; but, in the absence of information not available from any public source, it was not possible to prescribe a starting and ending date for the alleged course of wrongful conduct. The reasons for this appear not only from the Complaint, but from the response of defendants Marine Midland,

et al., to plaintiff's First Request for Production of Documents. Plaintiff, even now, has not been able to obtain information sufficient for her to estimate intelligently when the various states of facts alleged to have been concealed in the Complaint arose, or when they become known to the defendants, or when they were brought to the attention of the defendants by the cognizant federal authorities. Nor does the record show whether, even now, the matters alleged to have been concealed have been disclosed. Additionally, as pointed out in the Complaint, the securities of Marine Midland are listed and traded on the New York Stock Exchange, and have been so listed and traded at all times mentioned in the Complaint. (8a) Moreover, the numerosity of shareholders and of shares issued and outstanding (according to defendants, approximately 45,400 shareholders holding approximately 12,483,000 shares as of December 31, 1974 (30a)) support the inference that there were many thousands of shareholders, and substantial buying and selling of the stock throughout the period covered by the Complaint, but give only the vaguest hint as to the number of purchasers during any putative class period, and form no basis for proper determination of class membership.

Under the circumstances of this case, we submit that the District Court should clearly have held, as did the Court in Dickerson v. United States Steel Corporation, supra, that

plaintiff should be allowed the proceed with discovery before moving for class action determination, even though plaintiff had omitted to make a motion for such determination within the time provided by the applicable local rule of court. To hold otherwise is to create the anomaly recognized and rejected by the Court in Branch v. Reynolds Metal Co., supra. There, in overruling defendant Reynolds' objections to the plaintiff's interrogatories directed to class action issues, the Court said that sustaining such objections,

> "...would place plaintiff's counsel in the anomalous position of not being able to sustain its class contentions for lack of evidentiary support, yet unable to adduce such support by reason of its inability to prove class standing. Placing counsel in this bootstrap dilemma would be a perversion of the liberal spirit of the federal discovery rules." (Emphasis supplied.) 17 F.R.Serv.2d at 495.

To permit such an utterly inappropriate outcome is, we submit, an abuse of discretion requiring reversal. See Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975). There, recognizing the requirement of FRCP Rule 23(c) that a class action determination should be made "as soon as practicable after the commencement of an action," the Court pointed out that:

> "Practicality, in this context, must be judged on the basis of factors such as the detail in the pleadings, the amount of discovery pending and completed, the nature of the suit, fairness to the parties, and judicial efficiency." (At 1098.)

While that action was a civil rights suit, we submit that its approach is also applicable here, inasmuch as class actions under the securities laws are also a type of suit favored, and rightly so, by the courts. In support of its holding that the trial court had abused its discretion in denying class action treatment without permitting development of a factual record, the Court said:

> "The court too bears a great responsibility to insure the just resolution of the claims presented; it should be loath to deny the justiciability of class actions without the benefit of the fullest possible factual background.
>
> * * *
>
> "Far from being the scourge of modern jurisprudence, class actions contribute to its salubrity and vitality. The modern manifestation of the class action is an efficacious jurisprudential tool, whose applicability is neither universal nor monocentric. Rather, the trial court must ascertain the appropriateness of the class procedure only after a sensitive weighing of all the facts." (At 1099.)

In the light of the foregoing, we respectfully submit that the District Court's determination here with regard to the lack of any need for discovery should also be reversed.

CONCLUSION

For the reasons stated herein, this Court should reverse the order and decision of the District Court dismissing this action as a class action, and denying plaintiff the opportunity to have discovery of necessary facts in order to make a proper motion for class action determination; and should remand the cause for further appropriate proceedings.

Respectfully submitted,

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Service of 2 copies of this within Brief is admitted this 22 day of Oct. 1976

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